BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBORAH K. BAZIL Claimant	)	
VS.	)	
DETROIT DIESEL CENTRAL REMANUFACTURING Respondent	)	Docket No. 1,013,479
AND	)	
LUMBERMENS MUTUAL CASUALTY Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the post-award Order for Medical Treatment entered August 14, 2007, by Administrative Law Judge Brad E. Avery. The Board placed this appeal on its summary docket for disposition without oral argument.[1] Jan L. Fisher, of Topeka, Kansas, appeared for claimant. David F. Menghini, of Kansas City, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that at the time this case was settled, the only medical document attached to the record was from Dr. Lynn Ketchum, who noted that claimant had job-related inflammatory arthritis. Dr. Edward Letourneau has been treating claimant for inflammatory arthritis since before the settlement. The ALJ ordered that claimant was to be provided medical treatment with Dr. Letourneau until further order.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 19, 2007, Post Award Hearing; the transcript of the January 30, 2007,

[1] For purposes of K.S.A. 2006 Supp. 44-551(i)(1), September 18, 2007, is the date arguments were presented to the Board.

Settlement Hearing and the exhibits; the transcript of the deposition of Dr. Edward Letourneau taken November 2, 2006, and the exhibits; the transcript of the deposition of Dr. Lynn Ketchum taken September 18, 2006, and the exhibits; the transcript of the deposition of Becky Collins taken November 27, 2006; the transcript of the December 12, 2003, Preliminary Hearing and the exhibits; and the transcript of the October 19, 2006, Regular Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of the ALJ's order granting claimant's request for medical treatment with Dr. Letourneau. Respondent contends that claimant's inflammatory arthritis was neither caused by nor permanently aggravated by claimant's work activities for respondent. Respondent also contends that to the extent claimant's previous work activities may have temporarily aggravated her arthritic conditions, it is uncontroverted that all such work tasks have ceased and have not been undertaken in more than 18 months. Therefore, respondent contends claimant's need for ongoing treatment of her inflammatory arthritis is caused by the natural progression of a degenerative disease or aggravations resulting from ordinary daily activities. Respondent also asserts that the ALJ did not consider the deposition testimony of Drs. Ketchum and Letourneau when making his decision to award claimant post-award medical treatment.

Claimant argues that the ALJ considered the deposition testimony of Drs. Ketchum and Letourneau and concluded that she was entitled to post-award medical treatment with Dr. Letourneau. Claimant contends that by settling her claim, respondent admitted the compensability of the claim and that her inflammatory arthritis condition was work related. Claimant argues that the issue of compensability of this claim is *res judicata*. In the alternative, if the Board decides to determine causation, claimant argues that the only evidence in the record indicates that claimant's arthritis is work related. Claimant also requests that the Board award her attorney fees in this post-award matter.

The issues for the Board's review are:

(1) Is claimant in need of medical treatment?

(2) Is the issue of compensability *res judicata*? If not, did claimant's condition and her current need for post-award medical treatment arise out of and in the course of her employment with respondent?

(3) Is claimant entitled to attorney fees?

FINDINGS OF FACT

Claimant claimed she suffered injuries in a series of micro-traumas culminating in disability on or about August 2, 2001, caused by repetitive hand-intensive activities on the job. She filed a workers compensation claim for injuries to both hands, both wrists, both arms, the body and all parts injured or affected. This claim was settled on January 30, 2007, wherein claimant accepted a running award based on a 23 percent permanent partial impairment to the body as a whole.

Attached to the transcript of the settlement hearing is a report from Dr. Lynn Ketchum dated May 15, 2006, in which he diagnosed claimant with "inflammatory arthritis involving the right and left third digit interphalangeal [IP] joints and both wrists, with a decreased range of motion and pain producing weakness of pinch and grip strength."[2] In that report, Dr. Ketchum indicated that Dr. Bruce Toby did not think claimant had a work-related condition, but that Dr. Letourneau felt she had inflammatory arthritis that had been aggravated by her job. Dr. Ketchum did not set out specifically his opinion concerning causation in that report.

Claimant is still employed at respondent, but for about a year and a half she has worked in the sales department doing data entry rather than building engines on the production line. In that position, she is not required to do any repetitive gripping or grasping. She does not use any vibratory tools. She has not worked on the production line since sometime in 2003 or 2004.

Claimant continues to have problems with her hands. Currently, she does not participate in recreational activities but is able to perform household chores, although she has problems raking the yard if she grips a lot. She has arthritis in the middle fingers on both hands. She sees Dr. Letourneau approximately every three months and is treated with a drug designed to slow down the inflammatory process. It is her understanding that she will always be taking this drug. Because of that, she is required to have periodic blood work. In addition, Dr. Letourneau has treated her with cortisone shots in each wrist. Claimant's condition has not improved but, because of Dr. Letourneau's treatment, she has not gotten any worse.

At the post-award hearing, the ALJ agreed to consider the transcripts of the depositions of Drs. Ketchum and Letourneau and the regular hearing as part of this post-award proceeding. Dr. Ketchum saw claimant on December 23, 2004, at the request of the ALJ. He found that claimant had degenerative joint disease of the right and left wrist and the right and left third digit proximal interphalangeal joint. He opined that claimant's condition was not caused by her work but definitely was aggravated by her 15 years of using wrenches and power tools. He saw claimant again on May 15, 2006, at the request

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[2] S.H. Trans., Letter of Dr. Lynn Ketchum dated May 15, 2006, at 1.

of claimant's attorney. At that time, he concurred with Dr. Letourneau's diagnosis of inflammatory arthritis, a rapidly destructive form of arthritis frequently seen with rheumatoid arthritis. Dr. Ketchum, however, did not find that claimant had any of the markers for rheumatoid arthritis. Claimant has degenerative joint disease in her right wrist and inflammatory arthritis in her left wrist.

Dr. Ketchum testified that anything that overuses the joint would aggravate claimant's inflammatory arthritis. He stated that the type of work claimant did, including using vibratory tools and working ten-hour days, was definitely an aggravating factor to the progression of her inflammatory arthritis. However, in her left wrist, claimant has a bone-on-bone situation. Dr. Ketchum stated that anyone who has a bone-on-bone situation will have pain during everyday activities, including bathing, cooking and shopping. Claimant's degenerative arthritis in her right wrist would be aggravated by lifting heavy weights or using vibratory tools.

Dr. Edward Letourneau is certified in internal medicine with a subspecialty in rheumatology. Claimant was referred to him by her primary care physician for arthritic problems in her hands and wrists. Dr. Letourneau diagnosed her with inflammatory arthritis of the wrists and said she will be on medication long term to reduce the amount of inflammation, hopefully reduce the risk of having more long term joint damage, and improve her symptoms. She will also need blood tests on a periodic basis because of the medicine.

Dr. Letourneau testified that claimant's work at respondent did not cause her arthritis. He believed, however, that the work claimant did while working on the production line at respondent would have aggravated her symptoms. He would not distinguish whether her work only temporarily aggravated her symptoms or whether it accelerated her condition and made it worse over the long term. He agreed that more inflammation would cause more permanent joint destruction and that it was more probably true than not true that her repetitive work led to more inflammation.

Dr. Letourneau stated that claimant would have arthritis whether she worked at respondent or not, and the treatment she needs would have been necessary regardless of whether she worked at respondent.

PRINCIPLES OF LAW

K.S.A. 2006 Supp. 44-510k states in part:

> (a) At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative

law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

. . . .

(c) The administrative law judge may award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536 and amendments thereto. As used in this subsection, "costs" include, but are not limited to, witness fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs.

In *Nance*,[3] the Kansas Supreme Court stated:

Once the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable under the Kansas Workers Compensation Act so long as the worsening is not shown to have been produced by an independent nonindustrial cause.

When a primary injury under the Kansas Workers Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

In *Acosta*,[4] the Kansas Supreme Court stated:

The purpose of a review and modification hearing under K.S.A. 44-528 of the Workers Compensation Act is to create a new award. A review and modification hearing should not be used as a means of attacking the validity of an award for payments already made. Instead, the workers compensation appeals procedure is the proper avenue for such a challenge.

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[3] *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶¶ 3 & 4, 952 P.2d 411 (1997).

[4] *Acosta v. National Beef Packing Co.*, 273 Kan. 385, Syl. ¶ 1, 44 P.3d 330 (2002).

The Kansas Supreme Court stated in *Harper*[5]:

> The term "final award" used in the opinion is defined to be an award which will sustain an appeal in a workmen's compensation case taken pursuant to G.S. 1961 Supp. 44-556, "from any and all decisions, findings, awards or rulings of the director to the district court."

K.S.A. 2006 Supp. 44-551(i)(1) states in part:

> All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days.

K.S.A. 44-555c(a) states in part:

> There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

ANALYSIS

Respondent argues that claimant's inflammatory arthritis condition was not caused by and not permanently aggravated by her work activities for respondent. And "[t]o the extent that prior heavy work activities may have temporarily aggravated Claimant's arthritic conditions, it is uncontroverted that all such work tasks have ceased and have not been undertaken in more than 18 months."[6] However, respondent entered into a settlement agreement with claimant that was approved by the Special ALJ and entered as an award. That settlement included an agreed award that called for the payment of permanent partial disability compensation based upon a 23 percent disability to the body as a whole. In support of the agreement, the parties introduced the May 15, 2006, rating report of Dr. Lynn Ketchum. In that exhibit, Dr. Ketchum rated claimant's permanent impairment at 20 percent to each upper extremity as a result of the inflammatory arthritis condition for which claimant is now seeking additional medical treatment. He also recommended permanent work restrictions. By their settlement terms, the parties stipulated that claimant's inflammatory arthritis in her upper extremities is both work related and permanent. That

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[5] *Harper v. Coffey Grain Co.*, 192 Kan. 462, Syl. ¶ 2, 388 P.2d 607 (1964).

[6] Respondent's Brief at 1-2. (filed Sept. 5, 2007).

stipulation was made a part of the Special ALJ's award. The award was not appealed within 10 days and is final. The permanency of claimant's injury and her right to compensation are *res judicata*.

Respondent argues that it does not deny the diagnosis of inflammatory arthritis, which was also its position at the settlement hearing, but it now denies its relationship or causal connection to claimant's work. This begs the question, if the work-related aggravation was only temporary and not permanent, what was the meaning of the stipulation to a 23 percent permanent partial disability? Respondent, in its brief, cites *West-Mills v. Dillon*[7] for the proposition that where permanency of a claimant's condition does not result from a work-related injury, the employer is not liable for permanent partial disability benefits. That is correct, but in this case the employer stipulated that claimant is entitled to permanent partial disability compensation and, therefore, stipulated that her work permanently aggravated her condition.

Claimant has met her burden of proving she is in need of medical treatment and that it is for the same inflammatory arthritis condition for which she was awarded workers compensation benefits. Claimant testified that her condition has not changed and is the same now as it was in October 2006. The evidence presented proves that claimant's inflammatory arthritis condition has not improved since January 30, 2007, she is in need of medical treatment for her work-related condition, and there is no evidence of any subsequent injury which would relieve respondent of its obligation to provide medical treatment to claimant.

As for claimant's request for attorney fees, that issue was not decided by the ALJ. Claimant should first present her request to the ALJ for determination.

CONCLUSION

Claimant is entitled to ongoing medical treatment for her inflammatory arthritis in her upper extremities.

Claimant's request for attorney fees is remanded to the ALJ.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the post-award Order for Medical Treatment of Administrative Law Judge Brad E. Avery dated August 14, 2007, is affirmed.

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[7] *West-Mills v. Dillon Companies, Inc.*, 18 Kan. App. 2d 561, 859 P.2d 382 (1993).

IT IS SO ORDERED.

Dated this _____ day of November, 2007.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
David F. Menghini, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge